88-48

Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

OFFICER PRAET, individually and as a Police Officer of the City of Orange,
Petitioner,

vs.

SONYA KINGSLEY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the state court of appeal's analysis of the qualified immunity defense is in conflict with this Court's decision in Anderson v. Creighton, ___ U.S. ___, 107 S.Ct. 3034, ___ L.Ed.2d ___ (1987).

2. Whether the qualified immunity defense applies to Officer Praet's actions or whether that issue should be remanded to the trial court for determination in light of Anderson.

LIST OF PARTIES AND RULE 28.1 INFORMATION

The parties to the California proceedings below were:

Petitioner, OFFICER PRAET, individually and as a Police Officer of the City of Orange; and

Respondent, SONYA KINGSLEY.

[Additional party Defendants included CITY OF ORANGE and BANK OF AMERICA. The trial court found that Defendant CITY OF ORANGE had no liability to Respondent. The California Court of Appeal upheld that ruling in all respects. Defendant BANK OF AMERICA was dismissed prior to the trial of this action.]

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No. _____

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SUPREME COURT OF THE UNITED STATES

October Term, 1987

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vs.

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Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitioner, OFFICER PRAET, prays that a Writ of Certiorari issue to review the decision of the Court of Appeal of the State of California, Fourth Appellate District, Division Three, granting, in part, Respondent's Appeal. Respondent was seeking reversal of a judgment after trial entered against her on May 20, 1985, and finding for CITY OF ORANGE and OFFICER PRAET on all causes of action.

JURISDICTION

Respondent timely filed her Notice of Appeal from the May 20, 1985, judgment of Judge Robert J. Polis, Judge of the Superior Court, County of Orange, California. The state court of appeal filed its unpublished decision on January 26, 1988. Petitioner's Petition for Rehearing was denied on February 22, 1988. Thereafter, Petitioner petitioned for review by the California Supreme Court. That Petition was also denied on April 6, 1988, and the Remittitur was issued on April 8, 1988.

The jurisdiction of this Court is invoked under:

(a) Article 3, Section 2, Clause 2, United States Constitution; and

(b) 28 United States Code, Section 1257(3).

The Opinion of the California Court of Appeal, the Remittitur issued by that court, and their Order Denying Petition for Rehearing are filed under separate cover concurrently with this Petition as Appendices A, B, and D. Filed concurrently with this Petition under separate cover as Appendix C is the Order Denying Review by the Supreme Court of the State of California. Also filed under separate cover concurrently with this Petition as Appendix E is the Oral Statement of Decision by the state trial court in the form of a partial reporter's transcript.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment IV of the United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .
>
> (As Applied to the States)

42 United States Code, Section 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

This Petition seeks to ensure that City of Orange Police Officer Praet is allowed to present the defense of his qualified immunity to Respondent's civil rights cause of action. Specifically, this Petition requests a determination that the state court of appeal's analysis of the immunity conflicts with this Court's own decisions.

This Petition further requests a determination that the qualified immunity defense is applicable to Officer Praet's actions. In the alternative, this Petition asks that the issue of the officer's qualified immunity from liability be remanded to the trial court for determination there in light of this Court's holding in Anderson v. Creighton, ___ U.S. ___, 107

S.Ct. 3034, ___ L.Ed.2d ___ (1987).

The underlying case arises out of Officer Praet's investigative detention of Respondent, Sonya Kingsley. Both the state trial court and court of appeal determined the detention to be lawful, inasmuch as it was based upon the officer's reasonable suspicions that Respondent might be involved in a series of bank robberies. During the course of the detention, the officer initially searched Respondent's purse for weapons. Later, when Officer Praet discovered that Respondent had numerous aliases and used several addresses, he looked through the purse a second time for further identification.

At the conclusion of the state court trial, the superior court held that

Officer Praet's actions were entirely reasonable and lawful. The second search of the purse was held to be valid "as a product of the suspicious circumstances that were developing around the identification." Statement of Decision by the Honorable Robert Polis, Judge of the Superior Court of the County of Orange, State of California, filed concurrently with this Petition as Appendix E, at page E-55. This Court is respectfully referred to pages E-20 through E-56 of the Statement of Decision for a description of the circumstances surrounding Officer Praet's second search of the purse.

Respondent appealed.

The court of appeal upheld the trial court's determination in all respects,

except as to the second search of Respondent's purse. The court of appeal found that search to be a constitutional violation.

The court of appeal also summarily dismissed the possibility that the police officer's actions could be protected by the defense of qualified immunity, even though the immunity issue had not yet been raised directly by the parties. The state court of appeal relied on this Court's decisions in Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), and Pierson v. Ray, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967), in holding as follows:

> While a "good faith" defense is available in section 1983 actions (Harlow v. Fitzgerald (1982) 457 U.S. 800, 815; Pierson v. Ray (1967) 386 U.S. 547, 557), the facts in this

> case do not support such a claim in connection with the second search of plaintiff's purse. Officer Praet did not claim a subjective belief that he had probable cause to arrest plaintiff, and the objective facts would not support a finding of a good faith belief in the right to search.

Opinion of the Court of Appeal of the State of California, Fourth Appellate District, Division Three, filed concurrently with this Petition as Appendix A, at pages A32-33.

HOW THE FEDERAL QUESTION WAS PRESENTED

Since the trial court found no constitutional violation, the immunity defense was not addressed directly until the California Court of Appeal raised the issue sua sponte. In his Petition for Rehearing, Officer Praet argued the defense in light of Anderson, but his Petition was denied without comment. A

Petition for Review to the California Supreme Court also emphasized the conflict between Anderson and the court of appeal opinion. That Petition was also denied without comment.

REASONS TO GRANT THE WRIT

The court of appeal analysis of the qualified immunity defense is in direct conflict with this Court's decision in Anderson v. Creighton, ____U.S.____, 107 S.Ct. 3034, 3040, ___ L.Ed.2d ___ (1987), wherein it was specifically held that an officer's subjective beliefs about the legality of a search are irrelevant. As this Court emphasized in Anderson, the critical inquiry is whether a reasonable officer could have believed the search to be lawful, "in light of clearly established law and the information the searching officers

possessed." Id.

The state court of appeal, however, suggested that the second search could have been justified only if Officer Praet had testified to a subjective belief in having probable cause to arrest. The court of appeal opinion further conflicts with this Court's analysis in Anderson by not giving any serious consideration to the unsettled law in California regarding searches for identification.

Most importantly, if the court of appeal decision is allowed to stand, Officer Praet will effectively be precluded from even presenting the qualified immunity defense. Since the trial court found no constitutional violation, the immunity defense was not

an issue and was not argued directly. By misconstruing the application of the defense, the state court of appeal has thereby deprived Officer Praet of a defense guaranteed under federal law.

The full record clearly reflects Officer Praet's interest in determining Respondent's true identity. Were this Court to review the trial transcript and related briefs, the applicability of the immunity defense in light of Anderson would be obvious.

In the alternative, however, the issue of Officer Praet's entitlement to the qualified immunity defense should be remanded to the trial court for determination in light of all the evidence.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted. In the alternative, the qualified immunity issue should be remanded to the trial court.

Dated: June 27, 1988

Respectfully submitted,

JAMES P. COLLINS, JR.

Attorneys for Petitioner

Supreme Court, U.S.
FILED
JUL 5 1988
JOSEPH F. SPANIOL, JR.
CLERK

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OCTOBER TERM, 1987

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

FILED
JANUARY 26, 1988
COURT OF APPEAL
FOURTH DIST. DIV III
ORANGE COUNTY

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

SONYA KINGSLEY,	)	G003100
	)	
Plaintiff and Appellant,	)	(Super.
	)	Ct. No.
v.	)	40-02-
	)	41)
BANK OF AMERICA, et al.,	)	
	)	OPINION
Defendants and Respondents.	)	
	)	
	)	

APPEAL from a judgment of the Superior Court of Orange County, Robert J. Polis, Judge. Reversed in part and affirmed in part.

Harry Lerner and Richard P. Herman,

ACLU Foundation of Southern California, Paul Hoffman and John Hagar Jr., NAACP Special Contribution Fund and Joseph H. Duff for Plaintiff and Appellant.

Cotkin, Collins, Kolts & Franscell and Deborah B. Andrews for Defendants and Respondents.

* * *

Plaintiff, Sonya Kingsley, brought suit against the Bank of America, the City of Orange and Officer Bruce Praet, a police officer for the City of Orange, for violation of her federal constitutional rights under 42 United States Code section 1983, and her state constitutional rights.[1/] Plaintiff

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1/ Initially plaintiff alleged additional causes of action against the Bank of America and Officer Praet claiming intentional and negligent infliction of emotional distress. Plaintiff first stipulated that no damages would be sought against the City of Orange or Officer Praet on the

(continued...)

alleged she was subjected to unlawful police detention at the Orange Hills branch of the Bank of America solely because she was Black. She also claimed during the unlawful detention her purse and hands were searched and her picture was taken, all in violation of her federal and state constitutional rights. A court trial resulted in judgment for defendants.

I. FACTS

On May 12, 1982, plaintiff went into the Orange Hills branch of the Bank of America on Chapman in the City of Orange. Bank employees noticed

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1/ (...continued)
emotional distress causes of action and then, after settlement, dismissed the entire suit as against the Bank of America. Plaintiff's case went to trial on the civil rights causes of action against the City of Orange and Officer Praet.

plaintiff because she was dressed in a full length raincoat, a hat, and dark glasses, even though it was a sunny, warm day.[2/] She looked around the bank, took a pamphlet from a display, and left without conducting any business.

Shortly after plaintiff left the bank, Officer Praet learned that an armed bank robbery had just occurred at the Lincoln and Tustin branch of the Bank of America in Orange. Praet had a "personal policy" of keeping the banks on his beat apprised of bank robberies in the area. He went to the Orange Hills branch and told employees a recent robbery had been committed by a lone Black male. Diane Admire told him a

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2/ Bank employees testified they were required to watch a film entitled "The Robbery" four times a year. The film stressed they should be on the lookout for persons dressed inappropriately for the weather, since a person's clothes could conceal something.

Black female had entered the bank earlier that day wearing a long raincoat, hat and dark glasses; she had conducted no banking business, but had merely looked around and left. Praet told the employees they should notify him if the woman returned.

On June 15, 1982, plaintiff appeared at the Orange Hills branch dressed in what appeared to be the same long coat, hat and dark glasses. This time she opened an account and deposited $100 cash.

The next day plaintiff returned to the bank and asked to withdraw $99 from her $100 account. Admire phoned Praet and he drove to the bank.[3/] He parked in the rear of the bank out of sight of

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3/ Two more bank robberies had been committed in the county by a lone Black man since the May robbery, and Paret had informed the Orange Hills bank employees about the later robberies as well.

the occupants. Plaintiff had been described to Praet over his police radio, and, when he entered the bank, he saw her seated at one of the desks in the center section. He approached and asked her to step outside with him.[4/] Praet was in uniform.

He walked with plaintiff to his police car and asked her for identification. She produced her California driver's license and a Visa credit card. He testified he took "temporary custody" of plaintiff's purse and did "a cursory visual search of the

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4/ Praet testified he took plaintiff outside "so as not to conduct my business with her inside the bank exposed to customers and other bank personnel . . . ." Praet used the north entrance into the bank because it was much less traveled than the main entrance, and, during the time he interviewed plaintiff, he did not see anyone come in or out of that entrance nor did he see customers or employees standing around observing the proceedings.

purse to be sure that there were no weapons concealed in the purse." He did this for his "own personal safety . . . thinking that this may be some type of involvement in a robbery situation . . . ."

Praet asked plaintiff if he could look at her hands. When she extended them he held them steady while he examined them for signs of narcotic injection. He did this because in his experience individuals involved in robbery and other property crimes are often "involved in narcotic use." In addition, he believed her speech was slow and "somewhat inarticulate." He found no signs of narcotic use on her hands.

Plaintiff's Visa card was issued in a different last name than that used on her driver's license. Praet took

plaintiff's Visa card into the bank and asked Admire to run a check on the card. Admire told Praet that plaintiff had opened a bank account with $100 cash the day before and today was attempting to withdraw $99. Praet testified in his experience this activity "is indicative of what they commonly refer to as a check kiting scheme, a form of bank fraud . . . ."5/

Admire told Praet a check of plaintiff's Visa card revealed a minor

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5/ Officer Praet explained his concern over plaintiff's banking activity as follows: " . . . if someone opens an account with a particular bank in a certain amount and then shortly thereafter withdraws a major portion of the account, the account would still show with anyone who might check to verify the existence of the account as being a valid and open account, and banks generally won't give the amount of balance of the account. So that if a person were to write checks on that account, anyone checking to verify the account would show that it was, in fact, a valid account, but perhaps would be at least susceptible to being overdrawn."

problem, either that the limit had been exceeded or a payment had been missed. She also told him plaintiff was the same individual who had entered the bank in suspicious clothing on May 12.

Praet returned plaintiff's driver's license and Visa card and asked her where she was living at the time. When she said she lived in Cypress, he asked her why she had chosen to do her banking in Orange. She replied she intended to go to Chapman College and wanted a bank close to school. Officer Praet was aware there were two other Bank of America branches closer to Chapman College than the Orange Hills branch. Praet testified her explanation made no sense under the circumstances. He asked her why there were different last names on her driver's license and her Visa card. She replied that Sarkany, the

name used on her Visa card, was her son's last name and she used that name on occasion as well as Kingsley.

Praet ran a warrant check and a DMV check on her driver's license. The DMV check revealed that plaintiff had used six different names in the DMV's records. It took approximately 10 to 15 minutes to conduct the warrant check, since each of plaintiff's several names had to be run through the records of various agencies.

Praet testified: "At this point in time with the other name appearing on her credit card differing from her driver's license, the fact that she had selected a branch which was not closely related to any business that she might be conducting in the City of Orange and the fact that she had provided a Cypress residential address, an Orange mailing

address as well as a Los Angeles address that appeared as another address on her driver's license indicated to me that there was some reason that she was attempting to disguise her -- either her name, identity or her location of residence." Based on that, he asked plaintiff if she had any other form of identification. Her purse was sitting on the hood of the police car. He testified that he thought "there may be fruits of some type of fraudulent activity in the purse," so he looked in the purse and found two other credit cards and a deposit slip for a Wells Fargo bank account. The two credit cards were also in a different name than Kingsley.

At this point Praet decided he would call a back up unit to bring a polaroid camera to the location so he could take

a field photograph of plaintiff. He testified to his reasons for ordering the camera: When he first contacted plaintiff he knew there had been three recent bank robberies, two at Bank of America branches, perpetrated by a Black male. He knew plaintiff had been seen in the bank before under suspicious circumstances. In his experience "an individual who's going to perpetrate a robbery at a bank will send an associate in for purposes of checking out the interior of the bank." Especially in light of his knowledge of plaintiff's activity at the bank on May 12, he had a "very strong belief" that she may have been involved "in some way in bank robberies." After talking with plaintiff and learning about her six different names, three different addresses and three different bank

accounts, he "also formed the opinion . . . that she might be involved in some type of bank fraud."

Knowing there were witnesses to the bank robberies, Praet testified he took the photographs because he "knew that a photograph would be extremely valuable in either eliminating Miss Kingsley from involvement in those incidents or perhaps showing that she was involved by way of a photographic lineup."

Praet ordered a camera before the warrant check was completed. By the time the warrant check was finished, Praet had detained plaintiff for approximately 20 minutes. The back-up officer arrived with the camera in approximately 10 minutes. Praet took three photographs of plaintiff, giving her one that was underexposed. After he took the photographs, Praet left; and,

as he testified, plaintiff was "free to go about her business." The trial court found the entire detention lasted a minimum of 40 minutes.

The trial court made an extensive oral statement of decision which found plaintiff had suffered no deprivation of her constitutional rights.

II. ACTION AGAINST POLICE OFFICER

United States Code section 1983 provides, "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper

proceeding for redress. . . ."

State courts have concurrent jurisdiction with the federal courts to entertain claims brought under section 1983. (Martinez v. California (1980) 444 U.S. 277, 283, fn. 7; Brown v. Pitchess (1975) 13 Cal.3d 518, 523.) "It is undisputed that since an action under section 1983 is based on federal statutory law, state courts look to federal law to determine what conduct gives rise to an action under the statute." (Bach v. County of Butte (1983) 147 Cal.App.3d 554, 560.)

1. Detention.

Plaintiff claims her detention was unlawful. As was stated in Terry v. Ohio (1968) 392 U.S. 1, at page 16, "It is quite plain that the Fourth Amendment governs 'seizures' of the person which do not eventuate in a trip to the

station house and prosecution for crime -- 'arrests' in the traditional terminology. It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." If a detention is unlawful and results in injury to the detainee that injury is cognizable under section 1983.

It is settled that circumstances short of probable cause may justify a police officer's brief detention of a person for questioning or other limited investigation. (Id., at pp. 20-21); In re Tony C. (1978) 21 Cal.3d 888, 892.) The standard for judging the legality of such a detention is succinctly stated in In re Tony C. as follows: "[T]he courts have concluded that in order to justify an investigative stop or detention the circumstances known or apparent to the

officer must include specific articulable facts causing him to suspect that (1) some activity relating to crime has taken place or is occurring or about to occur, and (2) the person he intends to stop or detain is involved in that activity. Not only must he subjectively entertain such a suspicion but it must be objectively reasonable for him to do so: the facts must be such as would cause any reasonable police officer in a like position, drawing when appropriate on his training and experience [citation], to suspect the same criminal activity and the same involvement by the person in question." (Fn. omitted.) (Id. at p. 893; see also, Terry v. Ohio, supra, 392 U.S. at p. 22.)

Before contacting plaintiff, Praet knew three bank robberies had been committed in the area, two at Bank of

America branches, and the robberies had been perpetrated by a lone, Black male suspect. He also had been told by bank employees that plaintiff, a Black female, had appeared in the Orange Hills branch at or near the time of the first bank robbery dressed in a long raincoat, a hat and dark glasses,[6] that she had looked around the bank and left without

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[6] Plaintiff contends the only reason the bank employees thought she was suspicious and the only reason Praet detained her was because she was Black. The trial judge found there was no evidence to support that claim and his determination is supported by the record. The bank employees testified they noticed plaintiff because her clothing was improper for the weather conditions. Officer Praet testified the fact she was Black was only one factor in his decision to detain her, and the color of her skin was a factor only because the bank robbery suspect was also Black. We cannot say that the trial judge abused his discretion in accepting Officer Praet's reasoning, although we note the connection is tenuous: There is no evidence the bank robber had an accomplice, and no presumption an accomplice would be Black.

conducting any business. Based on his experience and expertise, Praet reasonably concluded plaintiff might be involved in the series of bank robberies as a scout -- checking out the banks in advance of the robberies. While his information did not amount to probable cause, it warranted further investigation. (People v. Berutko (1969) 71 Cal.2d 84, 90.) An investigative detention respecting an already completed crime is permissible (United States v. Hensley (1985) 469 U.S. 221, 228-229), as is a detention based on an expected crime (Terry v. Ohio, supra, 392 U.S. 1). A reasonable police officer would suspect, as Praet did, that criminal activity had taken place, or might be about to, and that plaintiff might be involved in it. The trial court correctly determined the

initial detention was proper.

2. First Purse Search.

After detaining her, Praet asked plaintiff for identification and looked briefly into her purse to make sure it contained no weapons.7/ Plaintiff contends this search was unlawful. To justify such a cursory search for weapons "[t]he officer need not be absolutely certain that the individual is armed. . . ." (Terry v. Ohio, supra, 392 U.S. at p. 27.) Here Praet knew the person involved in the bank robberies had been armed and he suspected plaintiff might be connected with those robberies. Under the circumstances his concern plaintiff might be armed was reasonable, and the search of her purse

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7/ The record does not indicate if Praet had to open the purse to make the visual search, or if the contents were otherwise visible.

was less intrusive than the patdown search sanctioned in Terry.

3. Scope of Detention.

Plaintiff argues her detention went beyond any permissible scope. In Michigan v. Summers (1981) 452 U.S. 692, 700, the court acknowledged a lawful detention is not confined to the momentary stop and frisk situation involved in Terry. But we must look to the circumstances of this case. Plaintiff's offered identification contained two different last names. This heightened rather than allayed Praet's suspicions. He went into the bank to check on the Visa card and learned plaintiff had opened an account the day before. Plaintiff contends this should have allayed Praet's suspicions because a bank robber's accomplice doesn't usually open an account at the

target bank. But, Praet also learned plaintiff had returned to withdraw $99 of the $100 deposited. Again, Praet's suspicions were heightened, and now he also suspected possible bank fraud. After learning plaintiff lived in Cypress and, after receiving an unsatisfactory explanation as to her choice of the Orange Hills branch for her banking needs, Praet decided to run a DMV and a warrant check. Rational suspicion of criminal activity justifies extending a detention to make a warrant check. (People v. Suennen (1980) 114 Cal.App.3d 192, 200-201.) The DMV check revealed plaintiff had used five or six different names in her DMV records, again a suspicion heightening factor.

An investigatory detention, valid in its inception, may be extended unduly.

In Willett v. Superior Court (1969) 2 Cal.App.3d 555, 559 the court held it was impermissible to detain a defendant for 40 minutes to make a record check, absent any suspicious circumstances other than a motor vehicle equipment violation. However, the case before us is distinguishable. Here, at every turn in the investigative process, Praet learned information which reasonably increased his suspicion. He was duty bound to continue his investigation. As was said by the court in Pendergraft v. Superior Court (1971) 15 Cal.App.3d 237, 242, "No hard and fast rule can be formulated for determining the reasonableness of the period of time elapsing during a detention. The dynamics of the detention-for-questioning situation may justify further detention, further

investigation, search, or arrest. The significance of the events, discoveries, and perceptions that follow an officer's first sighting of a candidate for detention will vary from case to case. Nevertheless, in determining the reasonableness of further detention, favorable answers, observations, or perceptions must be regarded by the detaining officer as suspicion-allaying, rather than suspicion-heightening." Here, of course, Praet received unfavorable answers, observations and perceptions during the course of the detention. We agree with the trial court's determination that the detention under these circumstances was not impermissibly extended. (See United States v. Sharpe (1985) 470 U.S. 675, 685-686.)

4. Hands Examination

Plaintiff claims the "search" of her hands violated her constitutional rights. However, no search was involved. Noting plaintiff's speech seemed slow and inarticulate, Praet looked at her hands which were in plain sight. (See People v. Mack (1980) 27 Cal.3d 145, 150; People v. Roy (1963) 222 Cal.App.2d 156, 157.) She was not wearing gloves which had to be removed.[8/] Praet went no further with this line of investigation. The trial court correctly determined there was no intrusion amounting to a constitutional violation.

8/ As the trial court stated, "The fact that he checked her hands which were in plain view, considering the fact that it's also a minimum intrusion, is justified by the objective facts. His testimony is that her speech was [a] little slow, slightly slurred, and she was a tad bit argumentative."

5. Photograph

Plaintiff contends her constitutional rights were violated by the taking of her photograph. In Hayes v. Florida (1985) 470 U.S. 811, the Supreme Court held police officers acting without probable cause and without a warrant violated the Fourth Amendment when they took defendant from his house to the police station to fingerprint him. The court stressed the importance of the transportation to the police station, stating: "None of our later cases have undercut the holding in Davis [Davis v. Mississippi (1969) 394 U.S. 721] that transportation to and investigative detention at the station house without probable cause or judicial authorization together violate the Fourth Amendment." (Emphasis added.) (Hayes v. Florida, supra, 470 U.S. at p.

815.) The court went on to suggest a detention for in-field fingerprinting might be constitutionally permissible. "None of the foregoing implies that a brief detention in the field for the purpose of fingerprinting, where there is only reasonable suspicion not amounting to probable cause, is necessarily impermissible under the Fourth Amendment." (Id., at p. 816.) After discussing several cases, the court stated: "There is thus support in our cases for the view that the Fourth Amendment would permit seizures for the purpose of fingerprinting, if there is reasonable suspicion that the suspect has committed a criminal act, if there is a reasonable basis for believing that fingerprinting will establish or negate the suspect's connection with that crime, and if the procedure is

carried out with dispatch." (Id., at p. 817.)

In this case there was a reasonable basis for believing plaintiff's photograph might establish or negate her connection with the bank robberies. Furthermore, we believe that in-field photography is generally no more intrusive upon the personal security of a suspect than is in-field fingerprinting. Like fingerprinting, it cannot be employed repeatedly to harass an individual and it is an inherently reliable and effective crime-solving tool. While we find no case dealing with the legality of in-field photographs,[9] we uphold the trial

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[9] The cases relied on by plaintiff (People v. Farley (1979) 90 Cal.App.3d 851, 862; People v. Johnson (1976) 389 N.Y.S.2d 766, 769 [88 Misc.2d 749]) are inapposite. Both of those cases involved transportation of a defendant (continued...)

court's determination that the use of photography here was reasonable under the circumstances.

6. Second Purse Search

The second search of plaintiff's purse requires reversal. Praet had already satisfied himself that plaintiff was unarmed. He described his purpose in looking into plaintiff's purse a second time, not as a search for a weapon or identification, but as a search for the fruits of "some type" of "fraudulent activity." Clearly this was a search for evidence of a crime and could not be supported unless Praet had probable cause to arrest plaintiff. (See United States v. Robinson (1973) 414 U.S. 218, 235; Chimel v. California (1969) 395 U.S. 752, 763; People v.

9/(...continued)
to a police station where photographs were taken.

Mendoza (1986) 176 Cal.App.3d 1127, 1131-1132.)

A peace officer may make a warrantless arrest "[w]henever he has reasonable cause to believe that the person to be arrested has committed a felony, whether or not a felony has in fact been committed." (Pen. Code, §836.) "'Reasonable cause' has been defined as 'that state of facts as would lead a man of ordinary care and prudence to believe and conscientiously entertain an honest and strong suspicion that the person is guilty of a crime.' [Citations.] No exact formula exists for determining reasonable cause, and each case must be decided on the facts and circumstances presented to the officers at the time they were required to act. [Citations.]" (People v. Fein (1971) 4 Cal.3d 747, 752.)

The trial court's determination should be upheld if it is supported by substantial evidence. (People v. Windham (1987) 194 Cal.App.3d 1580, 1589.) We find, however, the evidence was insufficient to uphold the trial court's finding of validity with respect to the second search of the purse.

At the time he acted, Praet did not have cause to believe plaintiff had committed a felony; he only had suspicions she might be involved in some criminal behavior. While his suspicions were reasonable, they did not amount to probable cause. In fact, Praet testified, even after the search, he did not believe there was anything to support further action in the form of an arrest.

At oral argument, respondents cited People v. Long (1987) 189 Cal.App.3d 77

which discusses the propriety of an officer's search through a detainee's wallet for identification. While interesting, the discussion in Long is inapplicable here since Praet's stated purpose in searching plaintiff's purse a second time was to look for evidence of a crime. Under the circumstances, the trial court's finding that the second search of plaintiff's purse was warranted does not withstand constitutional scrutiny. Under existing law, in the absence of probable cause, reasonable suspicion does not justify a generalized, warrantless purse search for evidence. (People v. Valdez (1987) 196 Cal.App.3d 799, 805-806.)

While a "good faith" defense is available in section 1983 actions (Harlow v. Fitzgerald (1982) 457 U.S. 800, 815; Pierson v. Ray (1967) 386 U.S.

547, 557), the facts in this case do not support such a claim in connection with the second search of plaintiff's purse. Officer Praet did not claim a subjective belief that he had probable cause to arrest plaintiff, and the objective facts would not support a finding of a good faith belief in the right to search.

7. Damages

The trial court found, in effect, plaintiff failed to prove actual or punitive damages. However, this determination was made in the context of the trial court's finding there was no civil rights violation. Since we have concluded to the contrary concerning the second purse search, the trial court's determination concerning actual or punitive damages may or may not be altered by our determination of this

violation. Moreover, nominal damages are available in a section 1983 case when a plaintiff's constitutional rights are violated, even if the plaintiff fails to prove actual or punitive damages. (See Garey v. Piphus (1978) 435 U.S. 247, 266; Lancaster v. Rodriguez (1983) 701 Fed.2d 864.) Upon remand of this case, the trial court should reevaluate the evidence in light of the civil rights violation in the second purse search, and redetermine what actual, punitive, or nominal damages, if any, are appropriate.

III. ACTION AGAINST CITY

We turn to a consideration of the validity of the judgment in favor of the City of Orange. A local government entity's liability under section 1983 cannot be predicated on the theory of respondeat superior. (Monell v. New

York City Dept. of Soc. Serv. (1978) 436 U.S. 658, 690-691; Pyne v. Meese (1985) 172 Cal.App.3d 392, 406; Kreutzer v. County of San Diego (1984) 153 Cal.App.3d 62, 70.) The only basis for a municipality's liability under section 1983 is action taken pursuant to governmental policy or custom which results in deprivation or infringement of plaintiff's federal constitutional rights. "Local governing bodies . . . can be sued directly under §1983 . . . where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers. Moreover . . . local governments . . . may be sued for constitutional deprivations visited pursuant to

governmental 'custom' even though such a custom has not received formal approval through the body's official decision making channels." (Footnote omitted.) (Monell v. New York City Dept. of Soc. Serv., supra, 436 U.S. at pp. 690-691; Pyne v. Meese, supra, 172 Cal.App.3d 392, 406-407; Bach v. County of Butte, supra, 147 Cal.App.3d 554, 568-569.)

In this case plaintiff attempted to prove the City of Orange had a policy or custom of taking random photographs of detainees. The trial court held in favor of the city on the section 1983 cause of action, impliedly finding that no such policy or custom was proved. In fact, the evidence showed the taking of in-field photographs of detainees was entirely within the discretion of individual officers who were instructed to act on the basis of the circumstances

and articulable facts known to them at the time of detention. Plaintiff does not appear to challenge this implied finding, so we do not set out the evidence on that issue, other than to note it was sufficient to support the implied finding.10/

Plaintiff does assert "[t]he police dossier on Ms. Kingsley is unlawful." Implicit in this argument is the assumption plaintiff's photograph was illegally taken and was being illegally kept and/or used by the City of Orange Police Department. Since there was no evidence of a governmental policy affecting the taking of detainees' photographs, we have dealt with the

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10/ While most of the testimony at trial concerned whether the city had a policy with respect to photographing detainees, we also note that Police Captain Graves testified the department had no policy with respect to searching detainees' purses.

constitutionality of that action in connection with our discussion of Officer Praet's claimed liability under section 1983.

But plaintiff seems to contend the mere keeping of her photograph violates her constitutional rights. She contends her photograph might be placed "in mug books, in the company of convicts with long criminal records," or "in a volume of 'bank robbers.'" She claims her picture could be seen by police officers who will then be likely to detain her for questioning. She fears private citizens who see the picture will shun her, or she might be picked out of a mug shot book and unjustly accused of a crime. But plaintiff's fears are based on speculation. The trial court found, based on substantial evidence, plaintiff's photograph was not being

used improperly, and a dossier on her was not being prepared or kept by the police. Her photographs were attached to the field identification card prepared by Praet and sent to the bank robbery or bank fraud unit. Her photograph was to be used only in connection with the investigation of the particular crime she was suspected of. There was no evidence plaintiff's photograph was being used in mug-shot books.[11]

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[11] As the trial court stated: "It appears to the court that the procedures inside the department of Orange have been designed to pretty much protect the distribution. They [plaintiff's photographs] weren't used in photographic or identification line-ups. We have no information, actually, from either the bank fraud section or from the detective section dealing with the proposed robbery whether they were ever used. [¶] There is no evidence, actually, that they were ever used, and so the court, having found that they were not improperly taken and there is no evidence that they have been

(continued...)

Plaintiff claims the use of her photographs is prohibited by the privacy amendment to the California Constitution.[12] As noted, plaintiff has failed to prove any improper use of the photographs.

The trial court's judgment in favor of defendant City of Orange must be affirmed.

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[11] (...continued)
improperly used or improperly retained, it appears that they will in a routine fashion be purged or destroyed. They are in fact only attached to the F.I. card and sent wherever that F.I. card was to go, which would either be fraud or pursuant to the bank robbery. That's the extent of the court's knowledge."

[12] California Constitution, article I, section 1, provides: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." (See White v. Davis (1975) 13 Cal.3d 757, 773, et seq.)

IV. DISPOSITION

The judgment as to defendant Praet is reversed with respect to the section 1983 violation concerning the second search of plaintiff's purse, and the matter is remanded to the trial court for a redetermination as to damages, if any, sustained by plaintiff as a result thereof. In all other respects the judgment is affirmed. Appellant shall recover her costs on appeal as to respondent Praet. Respondent City of Orange shall recover its costs on appeal from appellant.

Taylor (Gary), J.*

WE CONCUR:

Wallin, Acting P.J.

Crosby, J.

*Judge, Orange County Superior Court, assigned by the Acting Chairperson of the Judicial Council.

APPENDIX B

COURT OF APPEAL - STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

Division Three

Office of the County Clerk
Orange County
700 Civic Cntr Dr. West
Santa Ana, CA. 92701

RE: KINGSLEY, SONYA
v.
BANK OF AMERICA
G003100
Orange County No. 400241

* * REMITTITUR * *

I, Stephen M. Kelly, Acting Clerk of the Court of Appeal for the St of California, for the Fourth Appellate District, certify the attached is a true and correct copy of the original opinion or decision entered in the above-entitled cause on January 26, 1988, and that this opinion or decision has now become final.

_____Appellant _____Respondent to recover costs.
_____Each party to bear own costs.
_____Costs are not awarded in this

proceeding.
__X__Appellant shall recover costs on appeal as to respondent Praet
__X__Respondent City of Orange shall recover costs on appeal from appellant

Witness my hand and the seal of the court affixed this April 8, 1988.

By: JOYCE A. NOHAVEC
Deputy Clerk

cc: All Counsel (Copy of remittitur only, California Rules of Court, rule 25(e)).

APPENDIX C

SUPREME COURT
FILED
APR 6 1988
LAURENCE P. GILL, CLERK

DEPUTY

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

4th District, Division 3, No. G003100
S004595

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

IN BANK

KINGSLEY

v.

BANK OF AMERICA et al.

LUCAS, C.J., DID NOT PARTICIPATE.

Respondents' petition for review DENIED.

EAGLESON
Acting Chief Justice

APPENDIX D

COURT OF APPEAL-4th DIST.
FILED
FEB 22, 1988

DEPUTY CLERK

COURT OF APPEAL -- STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

SONYA KINGSLEY
vs.
BANK OF AMERICA
G003100
Orange County No. 400241

THE COURT:

The petition for rehearing is DENIED.

TAylor
Judge*

We Concur:

Crosby
Justice

Wallin
Acting Presiding Justice

cc: See attached list

*Assigned by Chairperson of the Judicial Council

APPENDIX E

SUPERIOR COURT

OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

DEPARTMENT 12

SONYA KINGSLEY, Plaintiff, vs. BANK OF AMERICA, a corporation, CITY OF ORANGE, and OFFICER PRAET, individually and as a Police Officer of the City of Orange, and DOES I through XX, Inclusive, Defendants.	)	NO. 40-02-41

HONORABLE ROBERT POLIS,
JUDGE PRESIDING

REPORTER'S TRANSCRIPT

MAY 20, 1985

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KATHLEEN A. GUNNETTE,
C.S.R. #3403
REPORTER PRO TEMPORE

(The following proceedings were had in open court:)

The Court: We'll let our record reflect that everyone is back. I don't know exactly how to approach this task. It's a difficult one because it's an area of intense collision of emotions, so to speak. This will be an oral statement of decision, and as I indicated to you, I will go about finding facts and coming to certain conclusions based upon the facts. I will invite the attorneys at the conclusion to ask questions on behalf of their clients in order to make sure that I have covered at least their salient theories about the case and in order to make it clear.

It's pretty important, I think, in any kind of a case, whether it be a serious one or not so serious one, and

this is a serious case, that the parties understand the basis for the factual determinations and the basis for the legal determinations and further so that the record can be followed. It's a situation that we see in the California Supreme Court decision called In Re Pipinos, where the court actually says the judge should endeavor to leave footprints in the record, and so I will be leaving some footprints in the record. I'll try not to step on our two very able lawyers who have both been very diligent in their work, both Mr. Herman and Mr. Collins. Because we do not have a jury, we have a certain luxury in not having to -- the court doesn't have to run a tight ship, so to speak, for the benefit of the 12 or 14 citizens who would otherwise have been with us. So that luxury I give back to

you gentlemen as attorneys and to your parties.

The way I see the case is as I just previously outlined earlier, that the third cause of action, which is the only -- the third and fourth causes of action being the only two causes of action relevant in this case is a straight 42 USC 1983 deprivation of constitutional rights type of case surrounding the photographing procedures. The fourth cause of action, found in California Constitutional Amendment, dealing with privacy, along with the U.S. Constitutional provisions in that regard, search and seizure, security and possessions, discrimination regarding both Black and a woman. Those are pled under 42 USC 1983. I have a note to myself to read into the record something that I'm not going to do.

This is a case of first impression in the sense that I could find no reported cases involving detentions without arrests and the photographing of such suspects. I'm sure that if such a case existed, Mr. Herman or Mr. Collins would have called it to my attention, just out of good conscientious honest advocacy, whether it was in their favor or not in their favor, so I assume that we're talking about a new area.

I have a note to myself to make sure that we all understand and the record does, that throughout this trial the court has indulged in the presumption -- that is the presumption that in any kind of a context that the plaintiff in this case was innocent of any crime. There has been no proof that she violated any crime at -- violated any law in the State of California or the County of

Orange or the City of Orange, and so essentially what we have is the all resounding collision between the rights of a free member of society with society itself through its police department.

Essentially, with all the talk about the big bang and the war and the atom bombs and all that sort of stuff, probably the most significant collision that there is is the collision between an individual and organized society through its police department. We have survived so far without being blown away by any nuclear holocaust, but the other collision is just as important and unfortunately is going to be even more important in the future.

I'm going to take just about two minutes and talk a little bit about the way I see the difference between the confrontation between police and the

private citizen and how instead of it getting better it's probably going to get worse. When I was going to law school, which was shortly after the brontosaurus passed away, we talked about rather that ten guilty people should be set free than one innocent be convicted. It's one of the areas in which inflation hasn't really hit us, because since the time I went to law school and now, society has rather given the message that instead of that figure having been inflated from ten to fifty, that it's been deflated. Society's collective opinion, through the electorate, Proposition 13 scooping out the coffers and squeezing government, Proposition 8 being the will of the people to see that the criminal laws are enforced and enforced vigorously and pursuant to the federal standards and

restricting the California Supreme Court and restricting all of the -- the so called fate of the defendant, I don't know where that stands these days, whether it's that the old rule, ten guilty shall go away for every one -- in favor of any one person to be convicted who is innocent. It might stand somewhere around 4.2 to 1. I don't know. Your guess is as good as mine.

So not only do we have the public clamoring for rigid, efficient enforcement of its laws, we have a renewed interest by the private citizen in law enforcement. Something we haven't really seen since probably Wyatt Earp ruled his part of the earth. I say that not lightly, because when it was that Wyatt Earp ruled the earth, there was only one lawman per town and he was only involved in murders and cleaning

out the bars, I suspect, if we're to believe movies, and the private citizens took care of all the other law enforcement. They did it through lynch squads, and they did it through vigilantes and they did it through carrying guns themselves and they did all of the things that organized society has been solely taking away from the average citizen to enforce their own rules and perhaps rightly so.

A lot of innocent people died in the lynch squads and there is no appeal, I'm told, from a successful lynching. So society kind of took over the role of being the police officer. It appears for a while the citizens sort of eschewed police work. As a result, the police officer was kind of out there on his or her own, mostly his own, and the citizen simply didn't want to get

involved.

What we have seen in the last five or so years, maybe ten years, certainly the last five years, is an increased citizen involvement in police enforcement. It's kind of put a little bit of strain on our traditional rules of probable cause and reasonable suspicion, because now instead of the police officer being the only one seeing something happening, he's likely -- he or she, and now we have more shes -- is likely to get a telephone call about a suspicious person. It happens all the time, the neighborhood watch system. It happens all the time with businesses. I think that it's a good trend, because I, for one, would not like to see the growth of private police departments. Surely every bank can have its own police department if it wanted. Some of

them do.

Surely we don't want a whole series of private police officers representing private interests in enforcing the criminal law. It's still where it should be, with the public, and for a very good reason. The police departments are still democratic, which they are responsible for city councils and budgets. Instead of being the private gangs of General Motors as they were in the twenties and thirties. We all know that terrible history.

The difficulty that we're having, when you throw in technological advances, is an increased collision between the private citizen and, of course, the increased laws. The legislature passes them at the rate of 10,000 a year. There probably isn't a one of us who in the next five days

won't commit some kind of a violation, be it a parking violation, a simple moving violation, washing your car on the street, a myriad of little things that happen. The collision is getting more serious, actually, but fortunately our forefathers gave us a kind of pliable constitution. While that constitution has been plied for so many years in one sort of direction, it seems to begin to be plied back in another kind of direction. That's what we're about today.

I'm not going to change any directions. That's not my job. My job is only to find facts and apply the rules as I have them and the rules as I interpret them. I expect to do that. I'm not going to be changing any of the rules, but I do want to announce for the record what the source of those rules

are.

Obviously, we're dealing with the California constitution. Article 1, Section 1 deals with the new California right to privacy. It's attached to a lot of other rights, but I'm not going to read all that. I have previously indicated, and I'm now edging into that statement of decision, a rather long discourse as it relates to the photographic procedure in and of itself.

All by itself, based upon Captain Graves' testimony, I previously indicated that I did not find the procedure as operated by the City of Orange and as testified to by Captain Graves -- I did not find it to be violative of the U.S. Constitution, the California constitution under Article 1, Section 1, the right of privacy or under 42 USC 1983.

I took a motion for 631.8 CCP, a motion for judgment in that regard under submission, and I'll now indicate for the record that now after having even heard the defense case, it's even more clear that the court should have granted the 631.8 motion with regard to cause of action number three. With regard to the City and Officer Praet on cause of action number three, the court will grant judgment in favor of the defendant, that the procedure itself as utilized by the City of Orange is not violative of any of those three provisions.

I'm going to talk a little bit more about that to clarify it further down, but I did want to make sure that that particular ruling got into the record and the 631.8. The cases -- as I indicated, there are no cases exactly on

point with regard to the photographic procedure. Mr. Collins has submitted an interesting case, the Hayes case, as it deals with -- that's Hayes, H-A-Y-E-S vs. Florida, decided March the 20th, 1985.

As it relates to the fingerprinting procedure, and if it's any indication of where the United States Supreme Court is going, I previously read a quote from the case that says "there is thus support in our cases for the view that the Fourth Amendment would permit seizures for the purpose of fingerprinting if there is reasonable suspicion that the suspect has committed a criminal act, if there is reasonable basis for believing that fingerprinting will establish or negate the suspect's connection with that crime, and if the procedure is carried out with dispatch."

They go actually further than that. They talk about judicial intervention in that regard. Our particular case deals with a photograph and a field interrogation or field interview card and with a detention at a very minimum of 40 minutes. It could be longer than that, but it's certainly clear from the hard evidence -- the hard evidence being the paper evidence -- that the contact between the officer and Miss Kingsley was 40 or in excess of 40 minutes.

The court, regarding the cause of action number four, is going to find a series of facts. I'm going to go through all of those, but initially I will indicate that the facts as I find them do not support a violation of right to privacy, search and seizure, security and possessions, any discrimination as to being Black or a woman under the U.S.

Constitution or the California Constitution or 42 USC.

The facts that I find are also based upon a recent statement of law in the State of California as it relates to stops and detentions and, of course, it's now been read about three times in the record, but I think it's important that the record know that the court considered it and how the court considered it. I am going to read it out of a recent case, but it's really In Re Tony C., 21 Cal. 3d., 888 at 893. It's important to know the language, though, in order to justify an investigative stop or detention. That's what this case is all about. The circumstances known or apparent to the officer must include specific and articulable facts causing him -- how sexist they are -- to suspect that, one,

some activity relating to crime has taken place or is occurring or is about to occur and, two, the person he intends to stop or detain is involved in that activity.

The tough part of the test is not only must he subjectively, he being the police officer, subjectively entertain such a suspicion, but it must be objectively reasonable for him to do so. That's the other part of it. Not a question of the officer just having some subjective beliefs, but when confronted as in a motion to suppress or in a civil case, those facts must be objectively reasonable and therefore testable.

The facts must be such as would cause any reasonable police officer in a like position, drawing when appropriate on his training and experience, to suspect the same criminal activity and

the same involvement by the person in question.

Further helped by Terry vs. Ohio, 392 U.S., in which it's quoted that it's recognized that it may be the essence of good police work to adopt an intermediate response. The test for determining the lawfulness of a detention is whether under the totality of the circumstances it was reasonable. Essentially that is the test that the court is going to apply to the facts in this particular case. That is in a totality of the circumstances, whether it was reasonable for Officer Praet to come to the conclusions that he did.

The court, of course, has already indicated that it finds that he did. First of all, the court finds that the plaintiff in fact entered the Bank of America on the earlier date, May -- the

May date, wearing a long coat, glasses and a hat, and that pursuant to the evidence that was presented, that that was a typical May day which was sunny and warm. She stayed approximately two minutes, transacted no business and then left.

By itself, standing all by itself, no one in their right mind could conclude that Miss Kingsley committed any crime on that. It's certainly not against the law to be Black, to be in a long attire, to visit a bank, to do nothing. That is the nature of free society and the court cannot by itself attach any significance to that.

She was noticed by a bank employee by the name of Admire or Luker, and that person believed that she looked suspicious due to the fact of her training. Her training was to note

anybody who had a long coat, hat or clothes that were inappropriate for the weather. The objective facts are that it wasn't that she was Black, but that the clothing called her attention, that is, Miss Admire's attention -- that is, Miss Kingsley's attention to the employee. It would be putting my head into the sand to suggest that it wasn't aided also by the fact that Miss Kingsley is Black. Clearly the evidence educed shows that this small bank branch is in a kind of a small community area. There is not much traffic in that area. There are no major roads in and out. It's a community bank, the testimony was, and the court can practically take judicial notice of the fact that it's in an area in which there are not a large number of Blacks living. It's clear that Miss Admire had to also have

considered the fact that Miss Kingsley was Black.

On the other hand, there are other articulable facts and ones which by the training of the officers, both officers who testified, clearly are indicative of the fact that the person could be considered to be suspicious. At that point, the court could conclude and should conclude that there was no reason at that time to have stopped Miss Kingsley. There was no telephone call by Miss Admire that a suspicious person was in the bank.

It's clear that while she may have thought she was suspicious, she did nothing about it because she didn't -- Miss Kingsley's suspicion did not arise to the level that amounts to anything. It's terribly coincidental, and I don't mean any inference by that, because Miss

Kingsley is presumed to be innocent of any crime. There has been no proof whatsoever that she was in any way connected with the bank robbery.

On the other hand, it's inconceivable that the court could not consider in the totality of the circumstances that within 60 minutes of Miss Kingsley's visit to the bank under "somewhat suspicious clothes" circumstances, there is a bank robbery in the Orange branch of the Bank of America, not very far away, with a Black male who knew the circumstances of the bank.

Officer Praet, who apparently is familiar with all of these branches because it's in his beat area or his jurisdiction, also within 60 minutes of the robbery, plus or minus a few, came into that particular branch of the Bank

of America, told the employees that there had been a bank robbery, at which time Miss Admire volunteered the information of the suspicious circumstances of Miss Kingsley. It appears that Miss Admire correctly, accurately conveyed the information to Officer Praet, who then in turn told her that if that person comes back in, please call. Now, all of these things, while raising a suspicion in the mind of Officer Praet, are objectively ascertainable, they are not the figments of his imagination. We had two witnesses, Miss Admire, Miss Collins, who came in and testified that they were aware of it. The officer -- apparently he was the one that asked them to call and he had this apparent correct information.

Later, Officer Praet gets a call

regarding other banks that were robbed by someone using the same vehicle as the vehicle that was the vehicle driven in the Orange bank robbery, and he gets that information. However, again, it simply would not provide probable cause to stop Miss Kingsley because she's not necessarily included in the bank robbery, but it would provide reasonable suspicion and it's at this time, after Officer Praet hears the information, that within 60 minutes, within a very short distance on the very same day of the bank robbery, that someone appeared suspicious in the bank who had no business -- who conducted no business in the bank. It's at this time, however, that Officer Praet can entertain a reasonable suspicion, enough to do an investigative detention. Had Miss Kingsley driven by right at that point

without more, it would be the conclusion of this court that Officer Praet could have stopped her, detained her and investigated those suspicious circumstances.

It's clear to the court that he entertained these thoughts subjectively, even at that very minute, and that they were objectively ascertainable. The problem with probable cause often is that it's subject to possible fabrication or creation in order to sustain a reasonable cause for a stop. On the other hand, there is absolutely no evidence in this case that any of these parties fabricated this evidence. There was a positive identification by two people. There is proof, vis a vis the police report, that the bank robbery actually did occur. It occurred in the City of Orange. It occurred at or about

the time that Officer Praet knew it. It occurred in the Bank of America. That Bank of America branch is close to this Bank of America.

Officer Graves testifies that it is the subject bank, that is, the one involved in this case, is basically not a very good location for bank robberies because it's not accessible to any major routes of ingress or egress. It's a small, local branch. Furthermore, to show as further evidence that this is not manufactured, Miss Admire calls Officer Praet on the 15th when she sees Miss Kingsley a second time and positively identifies her. She then calls again on teh 16th, having seen her a third time. It's clear at this stage that color -- the color of the skin is only being used to identify the individual. It's the same individual

and not any means of discrimination by anyone.

At this point, it's again clear that -- that is at this point in the analysis, that is June the 16th, when Officer Praet is called about Miss Kingsley coming back into the bank, Officer Praet only has the ability, the authority to reasonably detain for purposes of identification. That is essentially what he did. In fact, the court would conclude that the matter in which he accomplished this, by not making a major scene out of it, by inviting Miss Kingsley outside the bank and not discussing these matters with her, by not taking her behind the bank rail and into a private room, all of those things indicate that he believed he only had reasonable cause to detain her for purposes of identification and

not to make an arrest and did not make an arrest.

He asked her for her driver's license and then notes that her driver's license has a description of her hair which is different from her true hair color. The officer at this point has already concluded that in order to resolve the question of his suspicion, that is the suspicion of the unusual circumstances of Miss Kingsley coming into the branch Bank of America that was subject -- a sister bank subject to an armed robbery within a very short distance on the very same day and within an hour of the time Miss Kingsley is seen, the officer believes that he needs to have a photograph in order to confront the bank people to either eliminate her as a suspect or to indicate that she is a suspect.

Mr. Herman, and quite correctly so, has made a great deal of discussion about the fact that in all of the bank robberies there is no evidence of any accomplice and no evidence of Miss Kingsley having actually been involved. That appears to be true. There has been no evidence presented that she was involved.

On the other hand, Officer Graves tells us that in order to be a good bank robber, and I hope he doesn't change his profession, one needs to know what the inside of the bank looks like, what the security measures are, what the photographic needs are, whether there are cameras, whether it's a busy bank, ingress, egress, all of the things that are needed in order to be successful. Apparently, it appears in evidence that this bank robber has been a very

successful bank robber. There is no evidence that he has been apprehended and it does appear somewhat later in the evidence that he was very knowledgeable with the Bank of America. It's a very reasonable assumption that the bank was cased, so to speak, by someone other than himself in his planning a bank robbery.

Therein lay the suspicion. Added to that suspicion is the person who -- for whom it would be difficult to identify, number one, because of a hat, glasses and a full-length coat. Now the officer -- we have spent a lot of time talking about the suspicion of a full-length coat. Whether it can conceal an A.R. 16 or an M60 or a shotgun or whatever. The one thing that a long coat, hat and glasses does conceal is the person and it conceals the person from photographs

inside the bank, should photographs have been fortuitously snapped by the ever-present cameras inside the bank.

Added to the area of suspicions of the situation of Miss Kingsley is being covered to the point where it would be very difficult to identify her.

Now, if we take a little diversion into another case, and that's People vs. Harris. It's a 1975 case. People vs. Harris is 15 Cal. 3d., 384. People vs. Harris is kind of the seminal case for the problem of in-field identifications, something that was developing in the courts in the 1970's, which then later developed into photographing identifications and then, as we know, the pre-trial photographic identification rights of defendants.

People vs. Harris essentially says that you cannot transport the suspect to

the victim, so if Officer Praet had any thoughts of attempting to either eliminate Miss Kingsley or to implicate her as a potential individual in the robbery over at the other Bank of America branch, he could not, by People vs. Harris, put her in the car and drive her over to the bank and parade her around and say, does she look like anybody that you saw in the morning or any time around the robbery that occurred on May the 12th. It's clear that he could not do that.

He could have asked her consent to do that and having gotten that consent, he could have done that; but in an exercise of his discretion, considering he had no probable cause to arrest -- he certainly didn't have any probable cause to arrest Miss Kingsley at that time, certainly under the In Re Tony C. rule

test of reasonable suspicion that a crime had occurred and that she was involved in the crime.

As I previously stated and Harris gives a manner of a way to do it. Harris says on page 391, if there is a less intrusive way of doing identification, then the officer should do that. It says on page 391, or if they are able to procure a satisfactory identification from the suspect, the officer may arrange for a subsequent confrontation with the witness. So Harris says that the officer can identify an individual and then use the information to subsequently confront the other victims in the case.

In this case, he elected to use a photographic method to do that. That's getting a bit ahead. I think it's inescapable for the court to come to the

conclusion that the detention of Miss Kingsley was in fact a detention for investigation. It really does, in fact, amount to a seizure of the person for a temporary period of time.

It's true that she was not restrained. She was not told that she was restrained. In fact, she could have left. It appears that the officer left her and her purse, minus the driver's license and a Visa card, left her purse on the hood of the car and went into the bank for some period of time in order to find out if the Visa card was good. It's true that he did that. That certainly vitiates the quality of the detention.

On the other hand, he did indicate and it's perfectly reasonable to assume that if she had started to walk away, he would have gone after her because he had

not concluded his investigation. It does appear to the court in spite of her -- in spite of there being no actual consent solicited in the normal term of the words eliciting of consent, that she was really not free to go. I think it's inescapable for the court to conclude that there was in fact a detention which amounts to a seizure of the person, and so the court now has to look at both the quality of the detention and the duration and I expect to do that.

It should be noted for the record that the quality of the detention as evaluated by me is one of the least of all intrusions into the freedom of the individual. As I previously indicated, she was in fact -- she could have left if she wanted to. On the other hand, it's clear that she was submitting to the authority of a police officer and

was going to stay around. He did not intimidate her in any way. He wasn't coercive. He appeared to have been mindful of a certain amount of her privacy, considering the question that she was in fact in detention. She wasn't in a closed room.

He made no threats and her purse was right on the car. He never asked her to sit in the car while he went into the bank. He didn't frisk her individually. He did in fact pat down the purse for weapons, and that would be entirely reasonable considering that the reason for the suspicion was in fact an armed robbery.

The court further finds that the Visa card, according to the officer, was in the name of Sarkany and it's aided in its conclusion by Miss Kingsley's testimony that she actually didn't get

her Visa card until some 18 months after she applied for it. She applied in the name of Sarkany.

Of course, the court further finds that there was absolutely no problem with the Visa card or with the bank. She had violated no rules or laws as it relates to her use of her account.

On the other hand, the officer does know at this time, the time of the detention and in the very outset of the detention, that the driver's license shows different color for the hair. She was attempting to conceal her person and you can see in the photographs the entire head of hair is concealed in the photograph by the hat. One looking at her driver's license reading red hair could not see that her hair was actually a different color. Again, a perfectly reasonable thing to do, nothing wrong in

a free society of women changing their hair color, but in the totality of the circumstances itself, the allegation of concealing her true identity, concealing her person from photographic reproduction in the bank, that that would be suspicious to the officer.

He does a DMV teletype, which according to the court's recollection was fairly early in the detention. As a normal incident of trying to identify a person, the police officer asks for a driver's license and then attempts to run the driver's license to make sure the addresses are correct, it's still valid and whatever other information he can glean from the driver's license. We know that running a driver's license check, even in a non-moving violation situation, has not been declared by the California Supreme Court, at least the

majority, to be a violation of the defendant's rights.

The DMV check shows five AKA's, which, of course, to a police officer, may be suspicious. As it turns out, Miss Kingsley has reasonable excuses for having five names. They are not, as I indicated earlier, tremendous exercises of good judgment. On the other hand, none of them really is a violation.

On the other hand, having five different names on your DMV and were the officer now finding out that the address for the bank is different from that on the driver's license, the name on the Visa card is different from the one on the driver's license, the officer instead of quelling his suspicions, only adds to his suspicions. Something that the officer didn't articulate, but it certainly is reasonable that in the

light of having a number of names, if one runs the current name, that is the current name on the driver's license, it's likely to come up negative. On the other hand, if there are AKA's, it would behoove a police officer in doing his duty to run each and every AKA to see if there are any outstanding warrants on the AKA's. The officer does that, so the fact that the detention is now becoming a little longer than a normal incursion is not necessarily the officer's fault. He wasn't the one who gave Miss Kingsley five AKA's. He isn't the one who caused her to wear a full cap when covering black hair when her driver's license says red hair.

Listening to her testimony, her indication that she was going to go to the Chapman College and that she was going to get a bank account at a bank

close to Chapman College, what he knows -- and none of us may appreciate until he testified -- is there is a closer branch of the Bank of America bank within two blocks of the Chapman College. One that would be much more accessible to Miss Kingsley, and that certainly doesn't quell any suspicions that he might have that she is involved in a bank robbery or any prospective fraud on the bank.

All throughout Miss Kingsley is anything but cooperative. She very candidly and I must say admirably admits that she was a little sharp, as any citizen would be if they felt that they were being taken advantage of. After all, Miss Kingsley didn't know that there was a bank robbery and that she happened into this branch of the Bank of America on the very day that across

town, within six miles, at the very same time a bank robbery was occurring.

In spite of her being a little bit sharp, the officer apparently was very businesslike and didn't let it bother him. In any case, so he says. The fact that he checked her hands which were in plain view, considering the fact that it's also a minimum intrusion, is justified by the objective facts. His testimony is that her speech was little slow, slightly slurred, and she was a tad bit argumentative. So it turns out in truth that in her testimony here in court Miss Kingsley, who apparently was involved in drama, speaks not very clearly. It's not a crime to speak with lack of clarity. It's not a crime to slur. It's not a crime to be slow. It's not a crime to be slightly evasive.

On the other hand, it certainly

doesn't add to clearing up an officer's problem, and so it was that she was that way in court, too. The officer says he didn't check her arms because he believed that that was too invasive. It's hard to find that an officer is reckless and callous in his disregard for an individual's rights if he believes that the -- he's got full power of the individual and doesn't ask them to take their coat off, but he didn't. I agree with him, to have taken her coat off and examined her arms for puncture marks would have, number one, been beyond the scope of what he originally sought to achieve by detaining her. Secondly, it would have been too invasive, considering what he already knew.

Somewhere along the line he was beginning to get the picture that there

were no warrants and he calls for a camera. In one area which I have to conclude that Mr. Herman is closer to mark on in the sense that it appears that while the officer's intention may have been to take a photograph of the individual, Miss Kingsley, if and when he came across her and it is certainly clear by the court's analysis that he had the authority and the right to do so under the detention, he certainly waited for a long time to call for the camera. The only thing I can conclude, and he doesn't say it, is to agree with Mr. Herman that he thought maybe he would come up with a warrant and that would obviate the whole need to have an in-field photograph.

In any case, while the detention was for nearly a period of 40 minutes, the court does not conclude that that was

overly long, considering the circumstances and the circumstances I have already outlined. Number one, all of the P.C. type circumstances. Number two, Miss Kingsley wasn't particularly cooperative and she apparently was a little bit sharp. Again, it's no crime, but it does sort of delay the officer in his activities, not to mention adding a little bit of suspicion. She had five AKA's that he had to check out. He in fact had to check out the Bankamerica card. He called for warrants. A warrant check on all of the names, even if that took three or four minutes apiece to get those warrant checks out -- he was apparently using his pack set, which is the most expeditious way to do that. It wasn't that he was trying -- he was trying to make the detention any longer than it actually needed to be,

and there has been no evidence actually of how long such an activity would occur, but it wasn't his fault that there were so many names he had to check out and in order to complete an identification to make sure that this individual is the same person that she purports to be.

The court finds that it was well within his obligation and his duty to ensure that. There are many legitimate reasons for having lots of names, but having more than one name does cause a problem for secure identification, which was his obligation.

The court would note at this point that there is absolutely no evidence presented in this case that there is any larger percentage of Blacks or women who are subject to the photographic identification procedure or the field

identification cards. There is no indication in any part of the evidence that Miss Kingsley was detained for 40 minutes because she was Black or because she was a woman. In fact, this court would totally reject any concept that by simply being Black that all -- and there were crimes committed by Blacks in the City of Orange -- that all people of Black persuasion are subject to being unreasonably or detained for any reason.

It's clear that Black was simply only one factor that this officer took into consideration in determining that there was suspicious circumstances and that even more valued in his testimony were the facts of the suspicious circumstances under which he appeared in the bank.

The court has further found -- and I'm not going to go through all of the

factors. they're certainly here on the record -- that Officer Praet did not act with any reckless disregard to the civil rights or the civil liberties of miss Kingsley. There was no callous indifference. In fact, it appears in all ways he acted in a businesslike, efficient manner. It appears further that Miss Kingsley hasn't presented really any palpable damages.

Now, I want to say something for the record again. The court has found against the plaintiff and for the defendant. This is a very difficult area in dealing with damages, anyway. The problem is this, and no one addressed it and I wouldn't be addressing it in any great length either because of my findings, but it's clear that there is case authority for the fact that a violation of one's fourth

amendment rights amounts to a recoverable cause of action under 42 USC 1983. The difficulty I have is with the standard. Is any violation that would be the subject of a motion to suppress -- this is a question. Is any violation of the fourth amendment privacy right that would cause a suppression of evidence, which is one whole area of social policy, would it just automatically then become a recoverable right under 42 USC 1983? The court cannot conclude that every such violation would amount to a cause of action under 42 USC 1983.

The whole purpose behind the search and seizure rules and law is the public policy that says if a police officer violates an individual's right to be free from search and seizure, then the public is saying that simply can't be

used in prosecution and that's not a bad rule, as far as I'm concerned.

Does that automatically mean that a person has a cause of action? How was the person damaged? I have had to ask myself in this case to be totally fair and totally integral with the case, assuming there was a violation and the violation in my mind would have occurred with the search of the purse, assuming there was a violation, how is Miss Kingsley damaged? Was she damaged by having been detained for ten or fifteen minutes longer than she was? Was she damaged by not being able to conduct business with the bank?

She had already withdrawn all of her money out of the bank. She went back in and got overdraft protection. She finished. She went to summer school at Chapman and it apparently didn't deter

her from going back into the City of Orange. She had already been outraged at getting a traffic ticket. I am not certain that -- and there is no evidence of any psychiatric or psychological damage to Miss Kingsley.

Surely a violation of one's civil rights cannot -- it must have some impact somewhere. Courts, of course, have the ability to add money to one's losses or to one's violations. We do it all the time in wrongful death. One certainly can't make equivalent loss of death and money, so clearly the court would have had to find some -- there had to have been some damages if the court had found there had been a violation of the search and seizure act.

The court further -- but the court did not find any violation of Miss Kingsley's search and seizure rights

either, so it's really a moot question. The court further did not find any custom, policy or practice of the infringement of anybody's rights, be they Black, women or detainees for purposes of investigating a crime. Further, as I indicated, race -- there certainly has been no evidence that race was a ground for making this stop and detention.

I think I covered all of the facts that I needed to find, but let me first ask Mr. Herman if he has any areas that he feels the court should address itself to as far as findings of fact.

Mr. Herman: Yes, Your Honor. What does the court find as to the search of the purse?

The Court: The search of the purse is a little bit more troublesome than the rest of it, because the search

of the purse occurs later. The court would have found that a search of the purse at the outset would have been justified by reason of officer safety.

In other words, more than just a visual or a pat down, because of the nature of the crime for which Miss Kingsley, even though she had no part of it, was suspicious of. The search of the purse can only come later in a concept of developing probable cause on the suspicion of identification and concerning possible bank fraud.

While I'm on that subject, let me take identification first. The credit card, the seizure of the credit card or the search of the purse for credit cards was certainly as a product of the suspicious circumstances that were developing around the identification. The court previously noted all of the

other information that Officer Praet had regarding the banking activity, coming in on one day, depositing $100, taking out $90 that very morning, having an address in Orange that turns out to be a mailing address and not the current residence address, not giving the bank her residence address, the regular residence address which is on the driver's license and the need to see if there are any other, I think the officer indicated, instrumentalities of the crime, being more credit cards. That would be the only justification that I can see. It's pretty skimpy, as far as the police officer is concerned.

Mr. Herman: I'm sorry, Your Honor, does the court find that the search of the purse was a violation?

The Court: No, it wasn't a violation.

Mr. Herman: Okay, what does -- does the court find that the photos which were in evidence and the City of Orange file, of which we have a printout, are necessary information for the City of Orange police department today?

The Court: The answer to that is there was no evidence at this point that the bank robbery has been solved. I was interested, but I forgot to ask. Therefore, there is no evidence that the photographs or the F.I. card have become irrelevant in the case. For all we know, that bank robbery is still unsolved and they haven't completed it.

You did trigger my recollection, because I wanted to analyze for you -- I think I already did analyze, actually the whole photographic procedure, because there is more than just the

taking of the photographs that could result in a violation of Miss Kingsley's rights. That is the distribution of the photographs, the manner in which they're used and the manner in which they're retained. That could also cause or trigger a violation of her rights, even if they were taken appropriately and properly. If they are used improperly, that could still amount to a violation of the California Article 1, Section 1, dealing with privacy.

This case -- it appears to the court that the procedures inside the department of Orange have been designed to pretty much protect the distribution. They weren't used in photographic or identification line-ups. We have no information, actually, from either the bank fraud section or from the detective section dealing with the proposed

robbery whether they were ever used.

There is no evidence, actually, that they were ever used, and so the court, having found that they were not improperly taken and there is no evidence that they have been improperly used or improperly retained, it appears that they will in a routine fashion be purged or destroyed. They are in fact only attached to the F.I. card and sent wherever that F.I. card was to go, which would either be fraud or pursuant to the bank robbery. That's the extent of the court's knowledge. I don't know what else I can say, but there is no evidence that they're irrelevant.

Mr. Herman: And that's the same finding as to the information in the department file?

The Court: In the F.I. file, yes. Mr. Collins, was there anything

that you wanted to say?

Mr. Collins: No, Your Honor, but I would like to thank the court for its consideration of the evidence.

The Court: The area is a very difficult area because of photographs that really represent technological advances. I'm sure that they probably -- there was probably concern about the xerox machine when it came into existence, the teletype machine when it came into existence and it's really reflective of the whole problem of organized non-totalitarian society.

One reluctance of this court to even consider an injunction, as I previously outlined, was that an injunction broadly worded could prevent all kinds of good usages of photographs that would protect citizens as opposed to hurt them. The Harris case is a good example of just

that. I mean, they don't mention the use of photographs for purposes of aiding in the quick resolution of crime -- we really are on the technological frontiers. For example, I know they aren't available yet, but why aren't they going to be available some day? We are under surveillance. I mean, our entire society is under surveillance 100 percent, day and night, by those satellites that fly over.

I'm told personally by some pilots of the SR-71 that they -- the joke was -- I asked them, could they see a golf ball from 90,000 feet like they say, and the officers -- and the pilot said it depends whether it's in flight or on the tee. He says then we can tell you whether it was a Titus or -- well, that is really pernicious, because imagine photographs -- if they could tell you

where certain cars were at certain times of the day. I mean, we are on the technological frontiers of total surveillance. That's the kind of surveillance that white talks about, not this kind of surveillance.

For the court to restrict the City's use of a polaroid camera for purposes of investigation doesn't fall anywhere near the dangers of White vs. Davis, where they were using photographic surveillance indiscriminately. I have just as much concern as the next person and I'm sure even more, actually, and I'm sure that Mr. Herman could look at my history -- my track record on A.C.L.U. cases and find that I have ruled more for the A.C.L.U. than against them on matters involving those crucial rights, but we don't have that case. We don't have a surveillance case.

I previously talked about that and when I analyzed the photographic procedure earlier, I wouldn't hesitate a second to consider following White vs. Davis in a true surveillance case. This is not a true surveillance case.

Mr. Collins: Your Honor, you did jog my recollection on one item to ask you about, and that is with respect to the scope of the pleadings and the injunctive and declaratory relief that is pleaded. We did make a motion in limine at the outset to exclude any evidence, in fact, to dismiss all questions or allegations concerning injunctive or declaratory relief on the grounds, first of all, that the plaintiff hasn't pleaded anything to indicate that she individually was suffering from any threatened, irrepairable harm or injury in the City

of Orange, therefore didn't need an injunction as to her alone and that as to any purported class of citizens, that it simply wasn't pleaded that way. How has the court chosen to handle that?

The Court: I ruled in your favor at the outset. I ruled that those provisions in Paragraph 3 and Paragraph 5 of your prayer would be stricken by reason of the pleading and that I would reserve the right to resurrect them should the evidence occur upon motion by Mr. Herman. If he was able to prove them, I would resurrect them. He has inferentially asked me to consider a question of the continued use of the photographs. Regretably, because I have ruled against him, I have no authority to enjoin the City from doing anything with the photographs because I have no viable medium before me. It

certainly appears fortunate really for everybody that Miss Kingsley has never been proved by anyone to be involved in any criminal behavior of any sort and it would seem to me that an exercise of good discretion would be for the City to, if they are done with the photographs, accommodate Miss Kingsley in her request. I am not making an order that says I find the defendant not guilty, but he should give back the cow, because that is not -- it's not a compromise verdict. I have ruled as I have ruled because of the facts that were presented in the case and the law. I don't have any jurisdiction.

Mr. Collins: Well, thank you, Your Honor.

The Court: Mr. Collins, you'll prepare a judgment?

Mr. Collins: Yes, I will.

The Court: Okay.

Mr. Herman: Thank you, Your Honor.

The Court: Thank you again, gentlemen, for your presentation. I'm happy that the case turned out that there was no evidence of any criminal behavior on the part of Miss Kingsley, but that she just happened to be at the wrong place at the wrong time.

(Evening adjournment.)

Supreme Court, U.S.
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No. 88-48

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

OFFICER PRAET, individually and as a Police Officer of the City of Orange,
Petitioner,

vs.

SONYA KINGSLEY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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NO. 88-48

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

OFFICER PRAET, individually and as a Police Officer of the City of Orange, Petitioner,

vs.

SONYA KINGSLEY
Respondent.

BRIEF IN OPPOSITION TO PETITIONER FOR WRIT OF CERTIORARI

I. STATEMENT OF THE CASE

Petitioner seeks review in this Court of the California Court of Appeal's decision that he violated Respondent's constitutional rights by searching her purse for evidence of criminal activity without probable cause. Specifically,

Petitioner claims that the Court of Appeal's analysis of qualified immunity doctrine is at odds with the decisions of this Court, particularly this Court's decision in Anderson v. Creighton, ___ U.S. ___, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987).

However, as discussed below, the Court of Appeal's decision and analysis on this issue was an ordinary application of accepted principles which do not raise any issue worthy of review by this Court. Moreover, Petitioner has distorted the record in this case in the Petition by claiming, contrary to the record below, that the search of Respondent's purse was for purposes of "further identification." (Petition, at 7.) In fact, Petitioner testified at trial that this search was to find evidence of "fruits of some kind of fraudulent activity." (Petition, at

A-29.) Petitioner may not recast his testimony and the record in this case in an attempt to manufacture a qualified immunity defense.

II. REASONS FOR DENYING THE WRIT

A. The Court of Appeals Decision Is a Traditional Application of Qualified Immunity Principles.

The application of qualified immunity principles by the Court of Appeal was clearly correct and unremarkable in terms of qualified immunity doctrine.

Petitioner made two searches of Respondent's purse. The first was for identification purposes and was upheld by the court under Terry v. Ohio, 392 U.S. 1 (1968). However, the second search was conducted to look for evidence of crime. (Petition, at A-32.) This search was conducted without probable cause, as is

required under clearly established law that any reasonable police officer would be aware of. See, Ybarra v. Illinois, 444 U.S. 1049 (1979); United States v. Robinson, 414 U.S. 218, 235 (1973); Chimel v. California, 395 U.S. 752, 763 (1969); Sibron v. New York, 392 U.S. 40 (1968). The Court of Appeal found that, although Petitioner had enough reasonable suspicion to conduct his initial search of Respondent, there were no facts known to him that provided him probable cause to conduct the second search of Respondent's purse.[1] As a result, the Court of Appeal found that Petitioner was not entitled to qualified immunity. Harlow v. Fitzgerald, 457 U.S. 800, (1982).

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[1]This Court will not reexamine a state court's findings of fact. Grayson v. Harris, 267 U.S. 352, 358 (1925); Portland Ry. Co. v. Railroad Commission, 229 U.S. 397, 412 (1913).

The above analysis is entirely consistent with Harlow and with Anderson v. Creighton, supra. There can be no question about the requirement of probable cause for the second search of Respondent's purse. This requirement was as "clearly established" as any Fourth Amendment principle can be. The Court of Appeal was clearly correct given the record in this case in finding that Petitioner lacked probable cause to conduct the search.

Perhaps recognizing that the Court of Appeal's decision cannot be faulted on this basis, Petitioner makes a variety of meritless claims in an effort to induce this Court to accept this case.

First, Petitioner claims that the Court of Appeal erred in requiring that Petitioner have a "subjective belief in having probable cause to arrest."

(Petition, at 12.) While the Court of Appeal's opinion states that Petitioner did not claim a subjective belief that he had probable cause to arrest Respondent, it is clear that the Court found that under the objective facts known to Petitioner and the clearly established legal norms applicable to the search at issue, there was no probable cause for the second search of Respondent's purse. There is nothing in the Court of Appeal's opinion that indicates that the Court of Appeal required a showing of a subjective belief in probable cause as a prerequisite to a claim of qualified immunity. Moreover, the Court of Appeal's focus on the objective facts known to Petitioner is clearly the appropriate analysis under Harlow and Anderson. Under this objective test, Petitioner's claim of qualified immunity must fail.

Next, Petitioner claims that the Court of Appeal erred by failing to give "serious consideration to the unsettled law in California regarding searches for identification." (Petition, at 12.) Of course, the second search of Respondent's purse was not for identification but was for evidence of criminal activity. In any event, any uncertainty in California state law is irrelevant to the issue of qualified immunity under 42 USC § 1983. See Davis v. Scherer, 468 U.S. 183, 195 (1984). The Court of Appeal found a violation of Respondent's federal rights in this circumstance. There is no uncertainty in the clearly established federal law applied by the Court of Appeal in these circumstances.

Finally, Petitioner contends that he will be precluded from ever presenting his qualified immunity defense if this

Court does not grant review. This peculiar argument rests on the erroneous premise that the qualified immunity defense arises only after a constitutional violation is determined. Petitioner should have asserted his qualified immunity affirmative defense at every stage of these proceedings. By failing to raise this defense Petitioner waived his right to assert it. The Court of Appeal was not even obliged to consider this issue. In any event, Petitioner's qualified immunity defense is unavailing based on the clearly established law governing the search at issue.

III. CONCLUSION

There is no issue presented by the Petition which warrants review by this Court. The Court of Appeal properly applied the qualified immunity doctrine of this Court in the circumstances of this case.

The Petition should be denied.

DATED: July 29, 1988

Respectfully submitted,

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